NO. 85-732

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC.; AND OZARK AIR LINES, INC.,

Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, et al.,

Appellees.

On Appeal from the Supreme Court
of the State of South Dakota

APPELLEES' BRIEF

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QUESTION PRESENTED

The Supreme Court of South Dakota has construed Section 1513(d)(2)(C) of Section 7(d) of the Airport Development Acceleration Act of 1973, as added by Section 532 of the Airport and Airway Improvement Act of 1982, (49 U.S.C. 1513(d)), as excluding from the definition of "commercial and industrial property", personal property devoted to a "commercial and industrial" use which is not subject to a property tax levy.

The question presented is:

Does tax discrimination of the nature proscribed by 49 U.S.C. 1513(d) result when only commercial and industrial real property in the taxing jurisdiction is assessed and personal property is made exempt from tax by state law?

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PARTIES TO THE PROCEEDING

Parties to the proceeding include:

The South Dakota State Bcard of Equalization, whose duty it is to equalize the assessment of airline flight property; [1]

The Boards of County Commissioners of Beadle, Brookings, Brown, Codington, Davison, Hughes, Minnehaha, Pennington, and Yankton counties of South Dakota, whose duty it is to decide questions of abatement and refund of taxes; [2] and

The County Treasurers of the same counties, whose duties it is to make refund of taxes when it has been determined that the assessment is excessive or the tax paid is illegal when paid under protest. [3]

OPINIONS BELOW

The decision of the trial court, Circuit Court of the Sixth Judicial Circuit

1 SDCL 10-29-12
2 SDCL 10-18-2.
3 SDCL 10-27-7

of South Dakota, is unreported but appears in the Appellants' Jurisdictional Statement commencing at page 13a.

On the appeal from that decision, the opinion of the South Dakota Supreme Court in the case of Western Airlines et al. v. Board of Equalization et al, is reported at 372 N.W.2d 106 (S.D. 1985).

JURISDICTION

The Appellants invoked the jurisdiction of this Court under 28 U.S.C. §1257(2) from a judgment of the Supreme Court of South Dakota the court sustained the validity of the South Dakota Flight Property Tax, South Dakota Codified Laws 10-29, based on the enactment by the Congress of the Airport and Airway Improvement Act of 1982, codified at 49 U.S.C. §1513(d) Supp. 1986.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

See Appendix A for appropriate parts of the following:

A. Section 7(d) of the Airport Development Acceleration Act of 1973, as added by §532 of the Airport and Airway Improvement Act of 1982, 49 U.S.C. §1513(d).

B. South Dakota Codified Laws Annotated, §§10-4-6.1; 10-6-34.1; 10-29-2; 10-29-8 (1982).

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STATEMENT OF THE CASE

PROPERTY TAXATION IN SOUTH DAKOTA

By enactment of Chapter 28 of the Laws of 1897 the South Dakota Legislature

provided for the assessment and taxation of all real and personal property in the state. In the intervening 89 years, very little change was made in those laws and the tax collected was generally the sole source of support for local subdivisions of government. What utility property existed during that 89-year-period was assessed originally on behalf of the local units of government by first the State Board of Equalization and more recently by the Department of Revenue, South Dakota Codified Laws 10-28 through 10-38.

CENTRALLY ASSESSED OPERATING PROPERTY

As with most so-called "centrally assessed properties" it was the operating property of the system that was assessed as a whole unit. The local assessors only valued whatever non-operating property might be within their particular taxing jurisdiction. This was equally true with the airline

industry in the state prior to 1961. Whatever was owned and used in the state on the legal assessment day [4] was valued for tax purposes by the local assessor. As late as 1960 a committee of the South Dakota

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[4] Property generally in South Dakota valued and assessed as of January 1, SDCL 10-6-2 - utilities and carriers have various assessment dates so far as material here, airlines are assessed as of July 5 of each year.

[5] The Committee recommends that the Legislature make no change at this time regarding the refund of a portion of the aviation fuel tax, and that no flight property tax be adopted, but recommends continued study of the subject as the aviation industry develops in the state.

Because the aviation industry is in its infancy in South Dakota, and because further taxation on the operations of the airlines would tend to stifle its development, the Committee agreed that it would be unwise to impose any additional tax at this time. Therefore, both the proposals studied by the Subcommittee on Public Utilities - elimination of the graduated gas tax refund and the adoption of a flight property tax - are rejected for the present. However, the Committee does not believe that further study into these questions is necessary, and recommends that the Legislature, through its interim committee, continue to give consideration to the proposals.

Fifth Biennial Report

State Legislative Research Council

Vol 1 Pg 109

September, 1960

Legislature recommended [5] that no change be made regarding the refund of a portion of aviation fuel tax and that no flight property tax be adopted. The Legislature also sought the continued study of the subject as the aviation industry developed in the state. However, in 1961 the Legislature considered and adopted a law providing for an airline flight property tax. [6, 7]

FLIGHT PROPERTY TAX ON AIRLINES

A property tax was imposed on the flight property of airline companies operating in the state. The property was to be assessed by the Department of Revenue and no

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6 HB 712, 1961 Legislative Session. See Appendix for appropriate sections.

7 1961 was the same year that the first anti-discrimination tax legislation was introduced in Congress, HR 7497, making unlawful and an undue burden upon interstate commerce certain property tax assessments of common carrier property.

other local assessment was permitted. [8] The assessment was based on the use in the state of air flight property and combined the ratio of passengers, express and freight received in the state and discharged in the state compared to the total tonnage within and without the state; the ratio of flight time of aircraft of the airline company to the total flight time within and without the state and, finally, the ratio of revenue ton miles of passengers, mail, express and freight by the company flown within the state compared to the total within and without the state for the preceding calendar year.

After the assessment by the Commissioner of Revenue, now the Secretary of Revenue, the State Board of Equalization was required to equalize the assessment whereupon

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8 Ch. 449, Laws of 1961 Codified as South Dakota Codified Laws 10-29

the Commissioner of Revenue would compute the tax and average mill rate of all property within the state.[9] The tax then imposed would be allocated to airports where the airline companies made regularly scheduled landings. The tax was required to be used exclusively by such airports for airport purposes. [10] A minor amendment in 1968 changed the method of determining the average mill rate of the property. The law restricted the average to the valuation of property within municipalities operating an airport, rather than the average mill rate in the entire state. [11] Later, in 1970, the South Dakota Legislature changed the law again and the state went back to an average mill rate of all property [12]

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9 SDCL 10-29-14
10 SDCL 10-29-15
11 Ch. 262, Laws of 1968
12 Chapter 72, Laws of 1970, HB 849, SDCL 10-29-14

BASIS OF ASSESSMENT

The Constitution of South Dakota requires that taxes be uniform on all property of the same class. [13] To implement that provision, South Dakota law provides that property whether centrally or locally assessed be assessed at its full and true value. [14] There has been difficulty in the enforcement of this statute. In a number of cases, the courts of the state were called upon to equalize unequal assessments. In 1957 the Legislature, while still directing that all property should be assessed at its full and true value in money, determined that not more than sixty percent of assessed or full and true value should be considered as the taxable value of property on which to levy and compute taxes. [15] The state sales

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13 Article XI, section 2, South Dakota Constitution
14 SDCL 10-6-33
15 Ch. 459, Laws of 1957, SDCL 10-6-33

ratio study, which was produced each year by the State Revenue Department, showed that practices by local assessors varied across the state.

STATE USE OF PERCENTAGE ASSESSMENT

In assessing utility and railroad property, however, the state did not use the statutory sixty percent factor. In 1962, in a series of court cases brought by railroads and utilities, the South Dakota Supreme Court held that centrally assessed property must be given the benefit of any valuation formula which was applied to the advantage of locally assessed property.

CONGRESSIONAL HISTORY ON TAX DISCRIMINATION LAWS

The Act in question here and the reason for its adoption is tied to a series of proposals before Congress. These proposals ultimately brought about the 4-R Act in respect to railroad taxation.

In 1944, Congress received a report alleging discrimination against railroads in property taxtion, but no action was taken. Although reference was occasionaly made to this report in later congressional hearings, the legislative history of tax anti-discrimination laws can be said to start with submission of the Doyle Report in 1961. [16] The Doyle Report is a comprehensive study of transportation policies in the United States made by a special study group headed by General Doyle and submitted to the Senate Committee on Commerce. One chapter of the report deals with discriminatory taxation of railroad property. Prominently featured in this report is a table, submitted by the Association of American Railroads, showing

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16 National Transportation Policy, a report prepared by the Special Study Group on Transportation Policies in the United States for the Senate Committee on Interstate and Foreign Commerce, 87th Congress, 1st Session (preliminary draft 1961)

the overpayment of property taxes. This overpayment resulted from assessing of railroads at a higher percent than the percent at which other property is assessed. The Doyle Report points out that federal anti-injunction provisions (28 U.S.C. Section 1341) prevent federal courts from taking jurisdiction in tax assessment cases unless it can be proved that a plain, speedy and efficient remedy does not exist under state law. The authors of the report state that with respect to taxation, Congress has not utilized its powers to regulate interstate commerce. As a result, the role of policymaker in this area has been left to the Supreme Court.

The Doyle Report is concerned with the entire transportation system, and especially with competitive relationships within the transportation industry. It noted that railroads and pipelines are more heavily taxed than motor, air or water carriers, mostly because of state and local taxes on right-of-way property. The special study group recommended that railroads and pipelines be exempted from property taxation, with the exemption being phased in over a ten-year period in order to permit tax jurisdictions to adjust to the tax loss.

As an additional or alternative proposal, the special committee also mentioned a proposal offered by the Association of American Railroads declaring the following actions by a governmental subdivision or agency unlawful:

(a) the asessment, for purposes of the property tax levied by any taxing district, of property owned or used by any common carrier engaged in interstate commerce, at a value which bears a higher ratio to the true market value of such property than the assessed value of all other property in the

taxing district subject to the same property tax levy bears to the true market value of all such property, and (b) the collection of any tax on the portion of said assessment declared to be unlawful.

It was the alternative proposal, rather than the exemption of right-of-way proposal, that became the basis of legislative activity. The first hearing on the proposal was by the Subcommittee on Transportation and Aeronautics of the House Committee of Interstate and Foreign Commerce, in 1964. [17] No actions were taken in 1964 by the committee, and hearings were held by the same committee in 1966. [18] Again the bill was not reported. In 1966, action shifted to the

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17 Hearings before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, 88th Congress, 2d Session on HR 736 and HR 10169, 1964.

18 Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 89th Congress, 2d Session, on HR 4972, 1966.

Senate, where hearings were held by the Subcommittee on Surface Transportation of the Senate Committee on Commerce, and a bill was favorably reported the following year. [19]

The full Senate took no action, and hearings were held again in 1969. [20] Again the bill was reported favorably, and on January 30, 1970, the Senate passed S.927 by voice vote. This bill was an amended version of the Association of American Railroads' proposal.

With respect to testimony on S. 927, the South Dakota Department of Revenue filed a written statement with the Committee. [21] It concluded that the matter of discrimination was grossly exaggerated.

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19 S. 927, 90th Congress, 1st Session (1967)

20 Committee on Commerce United States Senate, 91st Congress, 1st Session S. 2289

21 Hearings on Surface Transportation of the Committee on Commerce United States Senate, Ninetieth Congress, 1st Session on S. 927 pg. 139.

Although a bill was reported by the Senate committee in 1972, no other bill passed either the House or Senate until Section 306 was passed as part of the 4-R Act [22] in 1976. The 4-R Act is a long piece of legislation dealing with problems of railroads brought to public attention by the bankruptcy or near bankruptcy of several railroads. No hearings were held on Section 306, and it was adopted with little discussion or debate. Section 306 is somewhat longer than the earlier bills, and some of the language reflects objections raised during hearings.

Section 306 was originally codified at 49 U.S.C. Section 26c, but before the effective date Congress recodified that section as part of the revision of the Interstate Commerce Act. The section is now codified at

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22 Railroad Revitalization and Regulatory Reform Act of 1976

49 U.S.C. Section 11502. The recodification substantially changed Section 306. Most of the courts which have considered the issue have taken the position that because the legislative purpose of the recodification was to restate the law without substantive change, the original version of Section 306 should be followed.

OTHER ENACTMENTS AGAINST DISCRIMINATION

Subsequent to that enactment but with a similar avowed purpose, the Motor Carrier Act of 1980 was passed. [23] A third enactment in 1982, [24] is the law now before the Court. It is a part of the Airport and Airway Improvement Act of 1982 (codified as 49 U.S.C. Section 1513(d)) and prohibits certain burdensome and discriminatory acts against air carrier transporation property.

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23 Public Law 97-261, Section 31A, 94 Stat. 823, codified 49 U.S.C. Section 11503 (Supp. 1985)

24 Public Law 97-238

SOUTH DAKOTA AIRLINES FILE PROTESTS

This background of South Dakota's property tax and litigation history and Congress's history in enacting anti-discriminatory legislation brings this case to May of 1983, when Appellants paid under protest taxes levied for the first six months of that year. Appellants thereafter sued in the appropriate counties for a refund. In addition, in order to counter the centrally assessed valuation of their property, Appellants appealed from the Department of Revenue to the State Board of Equalization and from there to the Circuit and Supreme Courts of South Dakota.

The state alleged that the "in lieu of" tax provisions of 49 U.S.C. 11513(d)(3) were what saved the tax. The Circuit Court determined that the tax was an "in lieu" tax and therefore not discriminatory nor subject to the Airport Development Acceleration Act.

On appeal, the South Dakota Supreme Court decided that the tax was not "in lieu of" other property taxes but rather, because of differences in the language between the Airport Development Acceleration Act and the Regulatory Railroad Revitalization and Reform Act of 1976, found that "commercial and industrial property," as defined in 49 U.S.C. 1513(d), only included property subject to a tax levy. Thus the airlines could not challenge their valuation or taxes based on a comparison of the treatment of tax-exempt taxpayers with the Appellants.

In a 4-to-1 decision the five member South Dakota Supreme Court held that the term "commercial and industrial" property as used in subdivisions (A) and (C) of 49 U.S.C. §1513(d)(1) means

> Property, other than transportation property and land used for agricultural purposes or timber growing, devoted

> to a commercial or industrial use and subject to a property tax levy. The locally assessed personal property, being exempt from personal property tax levy cannot be included as commercial or industrial property for comparison either (A) or (C).

It noted with approval at 245 a federal case in Arizona [25] holding that "property which is for any reason tax exempt is excluded as a form of commercial and industrial property."

The South Dakota Supreme Court further based its holding on the Eighth Circuit Court of Appeals decision in Ogilvie v. State Board of Equalization [26] The South Dakota court found that the fourth form of prohibited taxation, i.e. "any other tax" which was present and used as the grounds in

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25 Atchinson, Topeka & Santa Fe Railroad v. State of Arizona, 559 F.Supp. 1237(D. AZ 1983)

26 657 F.2d 204 (Eighth Circuit) cert. denied 454 U.S. 1086, 102 S.Ct. 644, 70 L.Ed. 621 (1981)

Ogilvie for its decision in that North Dakota railroad case, was not present in the Airline Improvement Act. Therefore the same reasoning did not apply to taxation of this class of property when personal property in the state was not taxed.

SUMMARY OF ARGUMENT

Congress did not intend that all property should be taken into consideration when determining whether or not airline property was being discriminated against. Testimony by representatives of the carrier industries argued for the broader scope, but the original piece of legislation, which has been followed in all subsequent tax anti-discrimination legislation, only requires that commercial and industrial property which is subject to a tax levy shall be compared to see if discrimination exists.

To remove from the South Dakota tax rolls first household goods and personal

effects and a year later other personal property, including business inventories, does not discriminate against airlines whose property is assessed and taxed on a use formula basis with the proceeds only used for airport purposes.

The South Dakota Supreme Court has consistently held that utility property is entitled to be assessed and taxed as is other property. This treatment takes place without any reference to Federal legislation.

The South Dakota Supreme Court as well as several Federal lower courts have correctly interpreted commercial and industrial property as that property used for commercial and industrial purposes which is subject to a tax levy.

ARGUMENT

The Appellants assert that the South Dakota Supreme Court did not properly examine the purposes of the Congress in

enacting tax anti-discrimination legislation. On the contrary, as will be demonstrated, the Congress changed its mind and gave the states more leeway when assessing property than the common carrier industry desired. Appellants have attempted to inject ambiguity where none exists in the law in question.

Congress identified specifically the forms of discrimination it intended to prohibit in its Anti Tax Discrimination Acts.

There can be no question that the Act in question here, as well as other related types of acts commencing with the 4-R Act, were passed to prevent discrimination in taxation. The common carrier and utility industries, over a long period of time, were able to document this before Congress. These were, generally speaking, in the area of property or advalorem taxation.

It is the position of the Appellees that Congress did not prohibit every form of discrimination, but rather defined the type of discrimination and the degree of discrimination which was proscribed.

For example, with respect to rail and motor carrier transportation property, grounds for court intervention include a avariable factor of five percent of the ratio of the assessed value to the true market value when compared with other commercial industrial property in the same assessment jurisdiction.

A similar comparative percentage does not appear in the Air Carrier Transportation Property Tax Law.[27] There the tax process is actionable if the property is assessed at any higher ratio of true market value than the ratio of other commercial industrial property of the same type.

27 49 U.S.C. 1513(d)

By the same token, railroads may not be discriminated against on the basis of four specified conditions: 1) the assessment at a value higher than other commercial industrial property, 2) the collection of a tax on that assessment, 3) the collection of the tax on a different rate than that applicable to commercial industrial property in the same jurisdiction or 4) any other tax that discriminates against rail carrier transportation property.

The law, with respect to motor carriers and airlines, contains the first three types of acts which are prohibited, but does not contain the fourth or potential catch-all tax freeze. It was that recognition by the South Dakota Supreme Court in this case that stands out in applying the federal decision in Ogilvie v. State Board of Equalization 492 (N.D. aff'd) 657 F.2d 202 (8th Cir.)

cert. denied 454 U.S. 1086 (1981). The Eighth Circuit Court of Appeals at page 210 said,

> As noted on our review of the history of this section (49 U.S.C. (11503(b)(4)) its purpose was to prevent tax discrimination against railroads in any form whatsoever.

North Dakota in Ogilvie had strenuously argued that personal property should not be considered as commercial and industrial property since it was not subject to a property tax levy in North Dakota. The Court points out that the catch-all section clearly eliminates that argument. The same catch-all phrase is not found in the either the Motor Carrier or the Air Carrier Tax statutes.

From all the hearings held it is plain that committees of Congress understood the discrimination that was involved and

appropriately worded the statute to do away with the most onerous. Appellants and Amici argue that an absurd result is reached when South Dakota may totally exempt one type of property but may not vary the comparable tax levy rate or ratio concerning the same property. This argument overlooks and avoids the basic proposition concerning taxes that when you are dealing with ratios of assessed value or rates of levy, you are dealing with property which is being taxed. Obviously if you have exempt property, whether it is a church, a state office building, or a merchant's business inventory which is exempt, you are not planning to tax that property. Therefore there is no ratio and there is no rate of tax and the same tests and standards do not apply.

Congress could have developed other logical bases of comparative discrimination. For example, it could have declared that a

tax that was not used to support the particular business being taxed would be discriminatory. Likewise, a tax which took a greater portion of the taxpayer's gross or net income than income derived from other property or an assessment which resulted in more than the unit valuation of the entire system would be discriminatory. Congress did not choose these approaches, however. It chose to define and limit the burdensome and discriminatory acts by the plain and unambiguous language used in the law.

LANGUAGE CHANGED FROM ORIGINAL ACTS PROPOSED

Earlier proposed versions of the laws in question required comparison with "all other property" as opposed to the final enactments which zeroed in on certain commercial and industrial property.

Appellants contend that the meaning of the term "all other property" in early versions of the law has not been changed by

the more definitive use of language as "commercial and industrial" property. Senate Report 91-630, Discriminatory State Taxation of Interstate Carriers at page 11, in an analysis of S-2289, contains this language:

> The phrase 'any other property in the taxing district' is not intended to interfere or restrict state action in extending total or partial exemption to property of a class, such as churches, charitable institutions, homesteads, and the like. In other words, property totally or partially exempt is not intended to be taken as a measure of 'any other property' for tax purposes.

Obviously Congress had problems with the term "all other property." See, for example, the testimony contained in the reported hearings of the Subcommittee on Surface Transportation on S-2362 and other acts. Serial number 92-71, particularly at page 292 and following, Mr. Lanier,then vice president

of the Louisville and Nashville Railroad Company, discusses with Senator Beall certain thoughts on this subject. Clearly Mr. Lanier evidenced a preference for the broader term of "any other property" while the Senator was attempting to elicit from him reasons why he thought it unfair to compare the property with other commercial or income producing property. A enlightening discussion followed between Mr. Lanier, Senator Pearson and Senator Hartkey, at page 295 of the same

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28 Senator Hartkey: ". . . let me say really what we are talking about. There is no one on this committee that I know of who is in favor of discrimination. But you do have a problem here, that I think you can see, that the committee members, I think all of us, do not want to go through another useless exercise when the bill comes up over at the House. And as of now I think it's not quite clear how you would overcome that argument which is being made - that is, where do you fit?

In other words, I think it's a definition of terms. When you say that you don't want to be classified with commercial property, or with business property when you are in a business, and when you say you want to be classified as all other property, you are back to the same problem, the question of definition - what is all other property?"

report.[28] In answer to Senator Hartkey's question Mr. Lanier apparently furnished the committee with a revised definition which, as shown on page 296, was subsequently received for the record. [29]

It is obvious that the spokesmen for the railroads at that time were not arguing for commercial and industrial property, nor were they arguing for the state's authority to exempt what they call the usual limited exemptions as religious, charitable, etc. Some logic could be, perhaps, ascribed to a meaning in the context of the use of the words "all other property" to mean that

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29 That definition reads, "the term 'all other property' means, in the case of real property used in transportation, all other real property other than land used primarily for agricultural purposes or primarily or the purpose of growing timber; in the case of tangible personal property used in transportation, all other tangible personal property; and in the case of intangible personal property used in transportation, all other intangible personal property. (Note - no mention was made of "traditionally exempt" property.)

churches and state office buildings were not really all other property because they are never considered in the tax base of a state or county.

The unit of comparison was changed before the final version from "all other property" to "commercial and industrial property." 30

Contrary to Appellants'argument, traditionally exempt properties would not by their very nature be included as commercial and industrial property.

Assuming for purposes of argument that the term "all other property" could somehow be said to exclude traditionally exempt properties, it does not follow that the statutory definition of commercial and industrial property used in each of the Acts

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30 S. Report Number 92-1985, 92nd Congress, Second Session at 2 (1972; Senate Report Number 94-585, 94th Congress, First Session, page 14, 138 (1974))

carries the same connotation. The section in question, 49 U.S.C. 1513(d) (2)(D), specifically excludes two types of property, namely transportation property and land used primarily for agricultural purposes or for timber. Therefore, without that exclusion the section reads, "commercial and industrial property means property devoted to a commercial or industrial use and subject to a property tax levy." By what stretch of the imagination would religious, charitable or governmental property ever be considered to be devoted to a commercial and industrial purpose? This would have to be the case if the Appellants' argument is to hold water. Clearly it can only be the property devoted to the commercial and industrial use which is subject to a property tax levy.

Several lower federal courts have explored this point and have held that property "subject to" a tax levy is property

which is presently taxed. Property which is for any reason tax-exempt is excluded as a form of commercial and industrial property. [31] Also the term "commercial and industrial property," as defined and used in the 4-R Act does not include inventory which is not subject to property tax. [32] This was affirmed in the Ninth Circuit Court of Appeals [33] with the comment, "We find no authority requiring untaxed property to be included in an average"

included in an average" [34] of assessed value for taxed property."

31 Atchinson, Topeka and Santa Fe Railway Company v. State of Arizona, Southern Pacific Transportation Company v. State of Arizona (D. Az. 559 F.Supp. 1237, 1983)

32 ACF Industries Inc., v. State of Arizona, (D.Az. 561 F.Supp. 595, 1982)

33 714 F.2d 93 (1983)

34 Amici Railway Progress Institute at page 20 pass off lightly these holdings, saying they are irreconcilable with Congressional intent. But Congress certainly had a purpose in making railroads exempt from "another tax that discriminates against a rail carrier," but not including that language in the Air Carrier Act

Appellants have also contended that the meaning of the term "commercial and industrial property" subject to a property tax levy could be used in the sense that it could be taxed if the people of the state chose to amend their Constitution, if the legislature subjected the property to a tax levy or if it was any property which the state had power to tax at all, Appellants' Brief, page 13. The cases just cited hold against that contention.

The Brief of Amici Railway Institute and Association of American Railroads on page 16, makes an incorrect statement concerning the reasons for the words "subject to a property tax" in its reference to S. Rep. Number 91-630, 91st Congress, Second Session, page 11 (1969). Nowhere in that report as referenced is there any discussion of the phrase "subject to a

property tax." Senate 2289,(c) [35] forbids state or local classifications whether based on constitutional provisions, statutory enactment or administrative orders, or practices designed or having the effect of discriminating against carrier transportation property by making it subject to a tax rate higher than the rate applicable to other property in the taxing district. According to the cited report, it was not intended to abrogate the right of a state to establish separate rates for different traditional classes of property, i.e. one rate for real property another, perhaps, for personal property and yet another for intangible properties. At the point in time when that report was issued the phrase "and subject to a property tax" was not in the law.

35 "(c) The collection of any ad valorem property tax on such transportation property at a tax rate higher than tax rates applicable to any other property in the taxing district."

It is interesting to note that the report of the Committee on Conference on S-2718, Report No. 94-595, 94th Congress, Second Session, which explains the 4-R Act as it was finally proposed and adopted based on the Conference Committee substitute, does not support the position taken by Appellants. That position being that only traditionally exempt property is included under the heading of property which is otherwise subject to a property tax. The Report, at page 165, describes the subject of the anti-discrimination legislation as prohibiting discrimination on rates or values generally applicable to "commercial and industrial property in the same assessment jurisdiction." Congress did not want the comparison to be made with all other property, neither did it want it to be made with all other transportation property. Congress provided only for the comparison with commercial and

industrial property excluding other transportation property and land, used primarily for agricultural purposes or timber growing, but not property which is not subject to a property tax levy.

Appellants and Amici have suggested this interpretation produces an absurd result which could well happen if a state were to exclude from a tax levy all other commercial and industrial property except centrally assessed property. It seems extremely unlikely, first, that a state would reduce its tax base where in most instances centrally assessed property is less than ten percent of the total base in the state and, secondly such open and notorious discrimination would, even without these particular tax acts, undoubtedly result in courts finding a denial of equal protection.

The law of South Dakota does not discriminate against Appellants and

courts have consistently held for equalization with other property.

In South Dakota the personal property tax which had been called a "liar's tax," on household goods and personal affects, was repealed in 1978 [36] one year later the business inventory tax was repealed. [37] This could scarcely be said to be a insidious plot to overtax utilities. In addition, the state legislature has annually replaced the personal property revenue loss with an appropriation of $40 million to the local subdivisions. This appropriation prevents shifting of the burden to taxable property. The Appellants have benefited from this appropriation.

The South Dakota Supreme Court has consistently upheld the right of railroads

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36 Section 1', Ch. 72, Ch. 73, Laws of 1978
37 Section 2, Ch. 72, Laws of 1978

and utilities to be free from tax discrimination.

In the first of these cases the Milwaukee Railroad and the Chicago Northwestern Railroad went directly to the South Dakota Supreme Court in an original proceeding for a Writ of Mandamus. [38] The South Dakota Supreme Court held that railroad property must be taxed under the same formula as other property. The state assessor thereupon began to take sixty percent of the full value of utility property.

RAILROAD LITIGATION

In 1963 the Chicago Northwestern Railroad again appealed from the state assessment of its property. Although the trial

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38 Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Gillis 80 S.D. 50, 118 N.W.2d 313 (S.D. 1962) and Chicago, Northwestern Railway Company v. Gillis 118 N.W.2d 316 (S.D. 1962) 80 S.D. 57

court [39] upheld the Commissioner of Revenue's determination of value, the Supreme Court found there was insufficient evidence of the allowance of obsolescence and therefore ordered that the property be reappraised. [40] On the question of equalization with other property the Court stated at 590,

> The railroad was entitled to have its property reduced to the same percentage other property was assessed.

However, since there was no evidence in the record of the percentage of value of personal property and since much of the railroad's property was personal, it was determined at that point the state was not required to use only the real property index. This case was

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39 Chicago & Northwestern Railway Co. v. Gillis 80 S.D. 617, 129 N.W.2d 531 (S.D. 1964)

40 Since the 4-R Act was the forerunner of Federal Tax Anti Discrimination legislation involving common carriers, a brief history of contemporaneous litigation in South Dakota is given for background purposes.

heard again in 1968, [41] and the court ordered a reduction of 44.19% of the system's total mileage based on an obsolescence factor relating to traffic density. Once more the Chicago Northwestern came to the South Dakota Supreme Court in 1971, [42] with respect to its property in the forty-one counties in South Dakota. This case challenged the 1964 valuation of the railroad and concerned the same proviso relating to a sixty percent of assessed value to be taken for taxable value. The claim of the railroad was that such valuation discriminated against it and in favor of other taxpayers whose property was assessed locally. This discrimination, the railroad claimed, was caused because the taxable value of their property was determined by applying a factor smaller than the

41 Chicago Northwestern Railway v. Gillis, 159 N.W.2d 293 (S.D. 1968) 83 S.D. 332

42 Chicago Northwestern Railway v. Schmidt, 188 N.W.2d 276 (S.D. 1971)

statutorily prescribed sixty percent. The State urged that the legislature had put the railroad property in a separate class and under the Uniformity Doctrine of the State Constitution [43] only all property in the same class need be treated for tax purposes in the same way.

RAILROAD TO BE TAXED AS ALL OTHER PROPERTY

The State Supreme Court did not accept that position and held that the railroad operating property had not been put in a separate class, either as to the factor to be used in arriving at its taxable value or as to the rate of tax imposed. The court referred to its decision in Milwaukee v. Gillis, 118 N.W.2d 313 (S.D. 1962), that such property was to be taxed at the same rate as property of individuals. Thus, if the railroads were assessed at a higher percent of true and full value than other property,

43 Article XI, Section 2

their affective tax rate would have been higher. The court at that time held that the railroad was entitled to have its property assessed at the same percentage on a county by county basis as other property in that taxing district. The next case in the taxation of other centrally assessed property was brought by Pennington County, a tax district of the state, claiming that at this point the State Board of Equalization and Department of Revenue had exceeded their jurisdiction by assessing utility companies at too low a rate.[44] State ex rel Pennington County v. Mernaugh, 210 N.W.2d 409 (S.D. 1973). In this original proceeding in Certiorari, the Court held that real property of all

[44] Thus it is clear that South Dakota even without the Federal legislation treats its taxpayers equitably. The fact that some small portion of personalty is tax-exempt does not entitle Appellants to relief since the property with which their property is compared is taxed uniformly in each county and neither the ratio nor the tax exceeds that of the Appellants.

utilities must be equalized on a county-by-county basis and personal property on the basis of sixty percent of the full and true value. The court clarified that holding but did not change the effect in Northwestern Public Service Company v. Stone, 215 N.W.2d 645 (S.D. 1974).

CONCLUSION

Congress limited to commercial and industrial property subject to tax the basis for comparison to establish discriminatory tax practices. South Dakota has not discriminated either under the criteria of Federal law or under state law. The Judgment of the South Dakota Supreme Court should be upheld.

Respectfully submitted,

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APPENDIX A

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A. Section 7(d) of the Airport Development Acceleration Act, of 1973, as added by § 532 of the Airport and Airway Improvement Act of 1982, 49 U.S.C., § 1513(d), provides:

§ 1513. State taxation of air commerce

* * * *

(d) Acts which unreasonably burden and discriminate against interstate commerce: definitions

(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value

that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection--

(A) "Assessment" means valuation for property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "Commercial and industrial property" means property, for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and

(E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.

(3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

SOUTH DAKOTA CODIFIED LAWS

10-29.8. The department of revenue shall assess annually on the fifth day of July of each year all flight property of airline companies serving the state. In making such assessment, the department of revenue shall consider all the reports, facts, and information filed, with any other information obtainable, concerning the value of the flight property of airline companies and may

add any property omitted from the return of such companies.

10-29-9. In making such assessment, which shall be reference to value and ownership on February first of the year for which the assessment is made, the secretary of revenue shall determine the true and full value of that flight property actually providing service in this state. The taxable value of such airline flight property upon which the levy shall be made and the taxes shall be computed at the same percentage as determined under §10-6-33.

10-29-10. The valuation of such flight property properly apportioned to this state shall be determined to be the proportion of the total valueation thereof, based on the average of the total of the following three ratios for each type of aircraft:

(1) That ratio which the total tonnage of passengers, express and freight

first received by the airline company in this state during the preceding calendar year plus the total tonnage of passenger, express and freight finally discharged by it within this state during the preceding calendar year bears to the total of such tonnage first received by the airline company or finally discharged by it, within and without this state during the preceding calendar year;

(2) That ratio which the flight time of all aircraft of the airline company on flights serving this state during the preceding calendar year bears to the total of such time in flight within and without this state during the preceding calendar year;

(3) That ratio which the number of revenue ton miles of passengers, mail, express and freight flown by the airline company on flights serving this state during the preceding calendar year bears to the total number of such miles flown by it within and without this state during the preceding calendar year.

10-29-11. Any airline aggrieved by the valuation of the flight property, or the application to its case of the apportionment methods prescribed by §10-29-10, may petition the secretary of revenue for determination of the valuation or the apportionment thereof to this state by the use of some other method. Thereupon, if the secretary finds that the application of the methods prescribed in §10-29-10 will result in inequities, he may determine the valuation, or apportionment

thereof, by other methods if satisfied that such other methods will fairly reflect such valuation or apportionment thereof.

10-29-14. The secretary of revenue shall, after assessing airline flight property as provided in this chapter and after such assessment has been equalized by the state board of equalization, compute a tax on that valuation by applying to that portion of the valuation which by law is subject to tax, the average mill rate which is obtained by dividing the total taxable valuation of all property for the preceding year within this state into the total of all state and local taxes levied within the state on a millage basis for the present year.

10-29-15. The taxes imposed by this chapter shall be allocated by the secretary of revenue to the airports where such airline companies make regularly scheduled landings and shall be used

exclusively by such airports for airport purposes as determined by the local airport governing body and approved by the department of transportation. Allocation shall be as follows:

(1) Twenty-five percent of the total tax assessed from each airline company shall be allocated equally to each airport in this state served by such airline company;

(2) Seventy-five percent of the total tax assessed to each airline company shall be allocated to each airport in this state served by each airline company on the basis which that ratio of total tonnage of passengers, mail, express, and freight first received and finally discharged at each airport in this state by such airline company during the preceding calendar year

bears to the total tonnage of passengers, mail, express and freight first received and finally discharged at all airports in this state served by such airline company during the preceding calendar year.